IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.09.2007

CORAM:

THE HONOURABLE MR. JUSTICE S. MANIKUMAR

W.P.No.19447 of 2007
M.P.Nos.1 and 2 of 2007

M/s.AD ADD,
rep. by its Proprietor
R.Murali ... Petitioner

Versus

1. The Additional Appellate Assistant
Commissioner of Commercial Taxes,
Coimbatore.

2. The Commercial Tax Officer(FAC),
Oppanakara Street Circle,
Coimbatore. ... Respondents

Writ Petitions filed under Article 226 of the Constitution of India praying for writs of Certiorarified Mandamus, to call for the records of the first respondent in his Check Memo in A.T.S.No.444 of 2004 dated 16.02.2004, demanding the petitioner to pay 25% of the disputed tax as a pre-deposit for admitting the appeal, quash the same and further direct the first respondent herein to admit the appeal filed by the petitioner relating to the assessment year 1998-99 under the TNGST Act, 1959 without insisting for the payment of 25% of the disputed tax as a pre-deposit.

For Petitioner : Mrs.R.Hemalatha
For Respondents : Mr.R.Tholkappian, Government Advocate

O R D E R

The writ petition is filed seeking a Writ of Certiorarified Mandamus to quash the order of the first respondent in his check memo dated 16.02.2004, demanding the petitioner to pay 25% of the disputed tax, as pre-deposit for admitting the appeal. The petitioner has also sought for a direction to the first respondent herein, to entertain the appeal filed by the petitioner for the assessment year 1998-99 under the TNGST Act, 1959 without insisting on payment of 25% of the disputed tax as pre-deposit.

2. Brief facts leading to the writ petition are as follows:
The petitioner is an advertisement consultant. He was under the bona fide impression that the transactions relating to his business will not fall under the purview of the definition 'Right to Use', and are liable for assessment under Section 3A of the TNGST Act, 1959. Therefore, the petitioner did not register themselves as dealers under the said Act and did not file their returns. Based on the

inspection conducted on 12.08.1998 and the report submitted by the officials, the second respondent has passed an ex-parte order of assessment for the year 1998-99, by determining total and taxable turnover of the petitioner at Rs.46,23,204 and Rs.46,23,204/- respectively, vide proceedings in TNGST No.540/1998-99 dated 31.12.2003. The petitioner was saddled with huge liability of tax, besides penalty under Section 12(3)(b) of the TNGST Act. Aggrieved by the order of the second respondent, the petitioner preferred an appeal before the first respondent, viz., the Additional Appellate Assistant Commissioner of Commercial Taxes, Coimbatore, under Section 31 of the TNGST Act. Though the petitioner submitted all the papers within the stipulated time, the first respondent rejected the appeal on the ground that the petitioner failed to pay 25% of the disputed tax as pre-condition for entertaining the appeal. Aggrieved by the same, the petitioner has preferred this writ petition.

3. Learned counsel for the petitioner submitted that in view of amending Act 14 of 1999, which came into effect from 10.06.1999, where an amendment was made at the end of Second proviso to Section 31-A of the Act, thereby, no appeal shall be entertained, unless it is accompanied with satisfactory proof of payment of tax admitted by the appellant, to be due or of such instalments thereof, as might have become payable, as the case may be and 12.5% of the difference of the tax assessed by the Assessing Authority and the tax admitted by the appellant. Subsequently, the above provision was again amended on 03.06.2002, and the expression 12.5% of tax was substituted by 25%. She further submitted that since the amendment came into effect only in the year 2002, the same is not applicable to the appeal proceedings, which were initiated prior to the amendment and therefore, the petitioner need not deposit 25% of the disputed arrears of tax, as a pre-condition, for filing an appeal.

4. Learned counsel for the petitioner submitted that the date of filing of return or the date on which the return is due as per the TNGST Act, whichever is earlier, has to be reckoned, as the date on which the proceedings were commenced or in other words, the 'lis' has arisen only from the year 1998-99, the amendment which came into effect in the year 2002 is not applicable to the case of the petitioner. In support of his contention, she relied on the decisions of this Court in Hugs Advertising Industries and Others v. C.T.O (T.N.T.S.T) reported in 2000 (119) STC 591 and D.C.T.O. v. Cameo Exports (Mad) reported in 2006 (147) SCT 218 (Mad).

5. Learned counsel for the petitioner further submitted that the amendment referred to above, was not given retrospective effect, therefore, the appellate authority ought to have entertained the appeal without insisting pre-deposit of 25% of the disputed tax. She further submitted that inasmuch as the assessment order is for the year 1998-99, the proviso as stood previously should be applied and therefore the petitioner is not liable to pay 25% of the disputed tax. Placing reliance on the unreported orders of this Court in W.P.Nos.35374, 36584 and 35274 of 2005, learned counsel for the petitioner submitted that a similar order may be passed in the present case also.

6. On the other hand, learned counsel for the respondents, on instructions, submitted that petitioner's premises were inspected on 12.08.1998, and certain documents were recovered. A statement was also obtained from the person in-charge of the premises. Investigation revealed that the petitioner, being an advertisement consultancy, collected boarding charges. Based on the details gathered at the time of the inspection and the boarding charges available on record, the assessment orders were passed on 10.03.2003 under Section 34 of the TNGST Act for the assessment years 1994-95, to 1997-98 was served on the dealers on 14.03.2003. He further submitted that the dealers have not produced the accounts enabling the Office to make assessment for the year 1998-99 and was proposed to determine total and taxable turnover for 1998-99 and in this context, objections were also called for. The dealers received the above notice on 18.03.2003 and submitted a letter for supply of xerox copies of D-7 records. Since the objections were not filed, the proposals made in the

notice dated 10.03.2003 were confirmed and accordingly, the assessment order was passed imposing tax on the turn over of Rs.46,23,204/- at 11% per annum and notice in form B-3 was also issued. As per Rule 12(3)(b) of the TNGST Act, penalty was confirmed to be levied at rate of 150% as against the tax of Rs.7,62,828/- and Form-54 was also issued.

7. Learned counsel for the respondents submitted that the proceedings have commenced only from the date of issue of pre-assessment notice and not from the date of inspection as contended by the petitioner. According to him, 'lis' commences only from assessment proceedings. In the instant case, according to the petitioner, the pre-assessment notice was issued on 10.03.2003. The provisions relating to pre-deposit came into effect from 03.06.2002 (Act 19 of 2002). Therefore, the counsel for the respondents submitted that it is mandatory for the petitioner to pay 25% of the disputed tax for entertaining the appeal. Learned counsel for the respondents submitted that the earlier orders of this Court in respect of assessment years 1994-95 and 1995-06 were passed and substantive arguments were not advanced by the respondents.

8. In Hoosein Kasam Dada (India) Ltd., v. State of Madhya Pradesh reported in (1953) 4 STC 114, the Supreme Court has considered an issue which arose under Section 22(1) of the Central Provinces and Berar Sales Tax Act, 1947. In the above reported judgment, the assessee was entitled to file an appeal, provided, he pays such amount of tax as he might admit to be due from him. But after the amendment, the appeal had to be accompanied by satisfactory proof of payment of tax in respect of which the appeal had been preferred. While considering the plea of the assessee as to whether he is required to submit satisfactory proof of payment of tax, the Supreme Court held that, "Whenever there is a proposition by one party and an opposition to that proposition by another a 'lis' arises. It may be conceded, though not deciding it, that when the assessee files his return a 'lis' may not immediately arise, for under Section 11(1) the authority may accept the return as correct and complete. But if the authority is not satisfied as to the correctness of the return and calls for evidence, surely a controversy arises involving a proposition by the assessee and an opposition by the State. The circumstance that the authority who raises the dispute is himself the judge can make no difference for the authority raises the dispute in the interest of the State and in so acting only represents the State. It will appear from the dates given above that in this case the 'lis' in the sence explained above arose before the date of amendment of the section. Further even if the 'lis' is to be taken as arising only on the date of assessment, there was a possibility of such a 'lis' arising as soon as proceedings started with the filing of the return or, at any rate, when the authority called for evidence and started the hearing and the right of appeal must be taken to have been in existence even at those dates. For the purposes of the accrual of the right of the appeal the critical and relevant date is the date of initiation of the proceedings and not the decision itself."

9. A Division Bench of this Court in D.C.T.C. v. Cameo Exports (Mad) reported in (2006) 147 STC 218 (Mad), considered following issues, as to what is the crucial date, on which the right of assessee to prefer the appeals against the order of assessment/reassessment gets crystallized and whether it is the date of assessment order or the date on which return is filed or required to be filed as per the statute or the date of issuance of pre-assessment notice. The Division Bench considered various decisions on this point in extenso and held that for the purpose of accrual of the right of appeal, the critical and relevant date is "the date of initiation of assessment proceedings and not the decision itself". The right to appeal becomes vested in the assesse, the moment he files his return which commences the assessment proceedings.

10. In Hugs Advertising Industries v. C.T.O.(T.N.T.S.T.), reported in (2000) 119 STC 591, the Special Tribunal in Paragraph 23 held as follows:
"We also give considerable weight to the Full Bench Judgment in Tamil Nadu Small Industries Corporation Ltd., v. State of Tamil Nadu [1989] 74 STC 303 (Mad.). They have diluted the emphasis

on "lis" and therefore the emphasis on commencement of proceedings in tax laws, become important. In this connection, we can also refer to rules 7 to 18 of the Tamil Nadu General Sales Tax Rules framed under the Tamil Nadu General Sales Tax Act. They prescribed the dates when dealers are obliged to file returns, under various circumstances. Even if a nil return is filed and accepted, there is no guarantee that it will not be re-opened. Any assessment order can also be revised. It is not proper to leave the discretion to the authorities, as to when they call for the accounts or when they issue a pre-assessment or a revision notice. It is wiser and safer to adopt a firm date as the date on which the vested right of appeals vests on the dealer/assessee. Therefore, in all the cases where the date of return or when the return became due under the Tamil Nadu General Sales Tax Act and Rules, whichever is earlier, was prior to Tamil Nadu Act 14 of 1999, will not apply and appeals can be filed in accordance with law prevailing prior to June 14, 1999, when Act 14 of 1999 came into force."
In the above reported case, the validity of the Tamil Nadu General Sales Tax (Fourth Amendment) Act, 1999 (Act 14 of 1999) was challenged. O.P.Nos.1157, 1158, and 1336 to 1339 of 1999 were filed to declare Tamil Nadu Act 14 of 1999 as unconstitutional and ultra vires. In O.P.No.1270 of 1999, the petitioner therein mainly questioned the second proviso to Section 31 of the Tamil Nadu General Sales Tax Act and the validity of Tamil Nadu Act 14 of 1999. O.P.No.1245 of 1999 was filed seeking a direction to the respondents therein not to insist upon payment of25% of admitted tax for entertaining an appeal under Section 31 of the Act. O.P.Nos.1325 to 1328 of 1999 relate to assessment years 1993-94 to 1996-97, to quash the orders passed by the appellate authority, refusing to waive the payment of 25% of admitted tax, under Tamil Nadu Act 14 of 1999, before entertaining the appeals. The argument advanced before the Special Tribunal was that, the moments the returns were filed, the assessee gets a pre-existing right to appeal and in respect of such appeal, no restrictions can be made by the subsequent amendment which was brought about in the year 1999.

11. In state of Madras V. Latheef Hameed & Co., reported in (1968) 21 STC 476, a Division Bench of this Court observed as follows:
" There is no controversy before us that the assessee' s right to file an appeal under the earlier Act is a vested right. Such a right becomes vested in the assessee, the moment he filed his returns which commenced the assessment proceedings....."

12. The Division Bench of this Court in (2006) 147 STC 218 (Mad) (cited supra) has held that for the purpose of accrual right of appeal, the crucial date is the date of initiation of assessment proceedings and not the decision itself. The right of the appeal becomes vested on the assessee, the moment he files his return which commences the assessment proceedings.

13. In Ghanshyamdas v. Regional Asst. Commr. Sales Tax, reported in AIR 1964 SC 766, the Constitution Bench of the Supreme Court, at Paragraph 35, held as follows:
"In the case of the unregistered dealer, the Sales Tax Officer commences the proceedings for assessment by the issue of a notice under Sub-s.(1) of S.10, and in the case of a registered dealer, the statute has already fixed the date for the furnishing of the return and therefore has set in motion the process for the assessment of the sales tax by the Sales Tax Officer."

14. The Tamil Nadu General Sales Tax Act, 1959, does not prescribe any limitation for initiating the assessment proceedings. But for the purpose of revision of assessment, Section 16 of the TNGST Act prescribe a limitation of five years period for revising the order of final assessment. For the purpose of accrual of right of appeal in respect of relevant date is the date on which, the returns are filed by the registered dealer. In the case of unregistered dealer, the commencement of lis is from the date on which, the notice is issued to the unregistered dealer. The collection of materials during inspection and verification of the same is only a preliminary enquiry conducted by the authorities

and the assessment proceedings commenced only if it is culminates into pre-assessment notice in the case of unregistered dealer.

15. The decisions cited by the petitioner are applicable only in the case of registered dealer. But in the case of the unregistered dealer, the assessment proceedings or the 'lis' commences only from the notice and not earlier. In the instant case, as the pre-assessment notice was issued on 10.03.2003, after the amendment to Section 31(1) of the TNGST Act and therefore, the petitioner is liable to pay 25% of the disputed tax and submit satisfactory proof of payment of tax for entertaining the appeal.

16. In the result, the Writ Petition is dismissed. No costs. Consequently, connected Miscellaneous Petitions are also closed.

.09.2007

To
1. The Additional Appellate Assistant
Commissioner of Commercial Taxes,
Coimbatore.

2. The Commercial Tax Officer(FAC),
Oppanakara Street Circle,
Coimbatore.

S. MANIKUMAR, J.

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